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Canada's Limitation of Hate Speech: A Comparative Perspective

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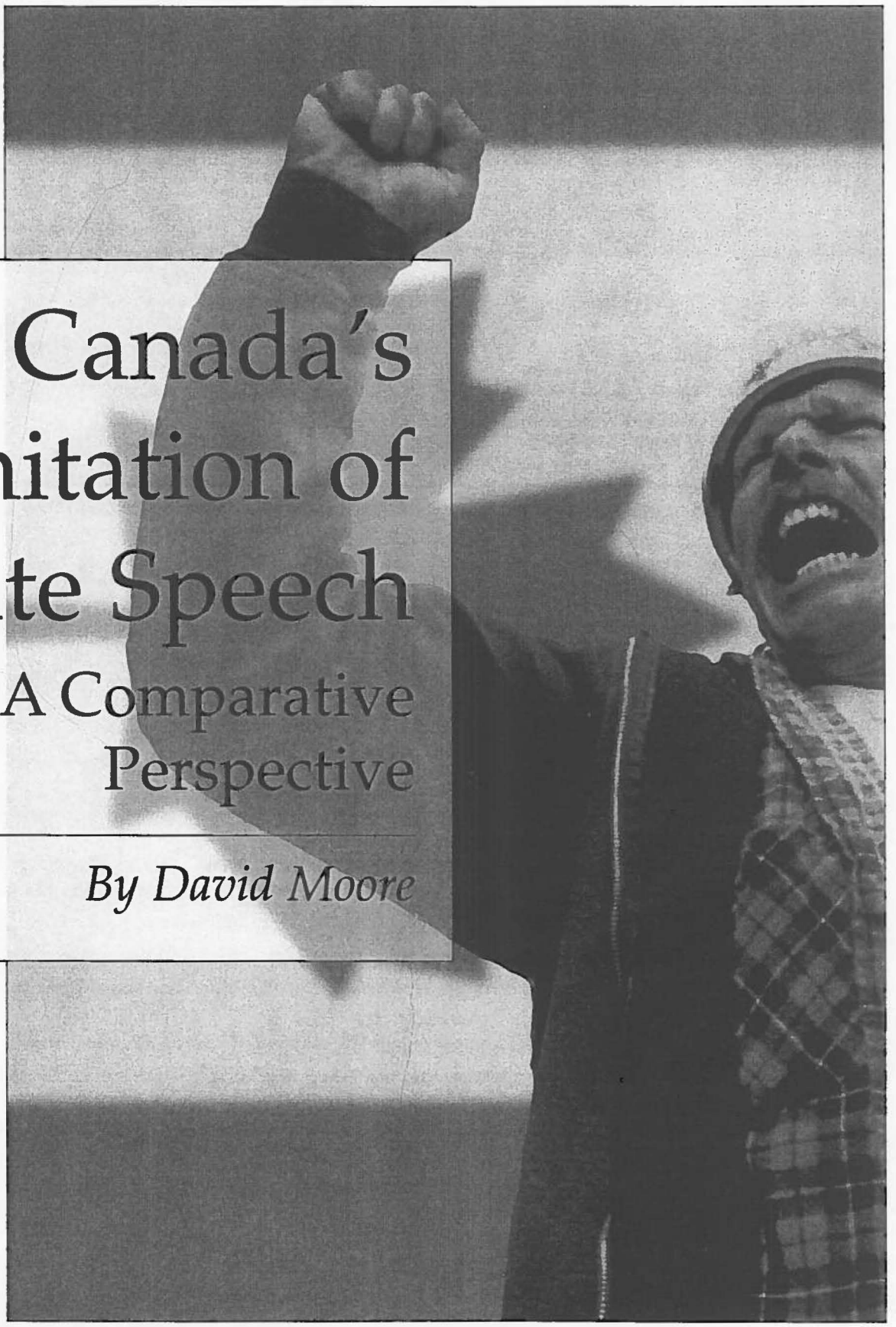


Canada's Limitation of Hate Speech

A Comparative Perspective

By David Moore

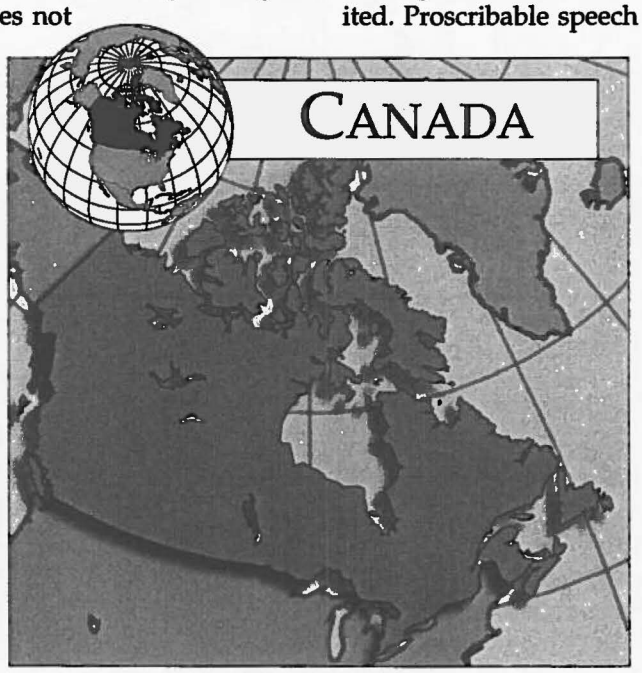
In the 1970s and early 1980s, James Keegstra, a high school teacher in Alberta, Canada, tainted his instruction with anti-Semitic ideas (Queen v. Keegstra, 713). He taught his students that Jews were money-mongers, infant killers, and power seekers; that they caused economic difficulties, wars, and social chaos; and that they manufactured the Holocaust to garner sympathy. He required his students to reflect his ideas on exams or suffer low grades (714). In 1982, Keegstra was prosecuted under Canada's criminal hate speech provision (713). That provision imposed liability on anyone "who, by communicating statements, other than in private conversation, willfully promote[d] hatred against any identifiable group" (713, 715 (quoting *Criminal Code*, R.S.C., ch. C-46 (1985) (Can.))). After being convicted, Keegstra appealed to the Alberta Court of Appeal, arguing that the hate speech provision violated the *Canadian Charter of Rights and Freedoms* (Queen v. Keegstra, 714), which recognizes freedom of expression as a fundamental freedom (Constitution Act 1982, § 2). When the Court of Appeal accepted Keegstra's claim, the Crown appealed (Queen v. Keegstra, 714). The Canadian Supreme Court then set out to determine the constitutionality of Canada's hate speech law. Based on an elaborate balancing test, the Court concluded that the law was constitutional (795). The Court thus upheld a criminal limitation on Keegstra's freedom of expression.

In a similar case two years later, the United States Supreme Court invalidated a hate speech ordinance because it violated the First Amendment (R.A.V. v. City of St. Paul, Minnesota 1992, 377). The petitioner (the party bringing the appeal) in *R.A.V. v. City of St. Paul, Minnesota* had allegedly burned a cross on a black family's lawn and had been prosecuted under St. Paul, Bias-Motivated Crime Ordinance (380). The ordinance criminalized placing "on public or private property a symbol, object, appellation, characterization or graffiti . . . which one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" (380 (quoting St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minnesota, Legis. Code § 292.02 (1990))). Petitioner claimed that the ordinance itself, not simply the way it was applied, violated the First Amendment. While the trial court accepted the petitioner's claim, the Minnesota Supreme Court upheld the ordinance as a legitimate limitation on fighting words (R.A.V. v. City of St. Paul, 380), which *Chaplinsky v. New Hampshire* had defined as words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace" (Chaplinsky v. New Hampshire 1942, 572). The United States Supreme Court concluded, however, that the ordinance, though applicable only to fighting words, was an unconstitutional content-based infringement on First Amendment rights (R.A.V. v. City of St. Paul, 383-85). The Court thus protected a petitioner's freedom of speech rights and reached a result different from that of the Canadian Supreme Court.

This paper seeks to better understand the Canadian Supreme Court's approach to limitations on free speech. The paper adopts a limited comparative perspective; that is, it uses the United States's approach to free speech limitations as found in *R.A.V.* as a reference point to illustrate how the Canadian approach has been more amenable to limitations on free speech. To that end, section one outlines the tests that the United States and Canadian Supreme Courts used in determining whether the hate speech regulations they addressed were constitutional. Section one first describes how the United States protects individual speech rights by limiting content-based regulation even of speech that under the Constitution may be proscribed. Section one also notes how Canada uses a balancing approach that locates free speech rights and limitations in the same source—the values of a free and democratic society—and thus is more willing to limit

Canada uses a balancing approach that locates free speech rights and limitations in the same source—the values of a free and democratic society—and thus is more willing to limit individual free speech rights in favor of social interests.

individual free speech rights in favor of social interests. Section two then suggests four reasons why the Canadian Court may have adopted a test more agreeable to limiting freedom of expression: namely, the text of the *Canadian Charter of Rights and Freedoms*, Canada's historical experience in protecting fundamental rights, the harms the Canadian court considered in balancing individual and social interests, and Canada's international legal obligations. Section two does not purport to survey all influences that may have led the Canadian Supreme Court to its more restrictive approach, nor does the section pretend to prove that the Court was affected by the reasons offered. Instead, section two recognizes the difficulty of proving influence on the court and merely explores factors possibly affecting the court's decision.



I. The Courts' Analyses

The U.S. Approach

In *R.A.V. v. City of St. Paul*, the United States Supreme Court adopted the rule that "content-based regulation[—regulation outlawing specific material—is] presumptively invalid" (382), because it raises "the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace" (387 (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board. 502 U.S. 105, 116 (1991))). The Court recognized, however, that the prohibition against regulations outlawing specific content is not absolute. Indeed, content-based restriction is allowed "in a few limited areas, which are 'of such slight value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality'" (R.A.V. v. City of St. Paul, 382-83 (quoting Chaplinsky v. New Hampshire 1942, 572)).

In determining whether content-based regulation will be allowed, the court applies what Cass Sunstein characterizes as a two-tier approach (8-9). The court first categorizes speech as either speech that may be proscribed or as speech that ordinarily may not be prhibited. Proscribable speech is apparently identified through a balancing effort that weighs the questioned speech's usefulness in determining truth against the social interest in order and morality (Queen v. Keegstra, 742). This balancing has identified defamation, obscenity, and fighting words as types of speech that may be proscribed (R.A.V. v. City of St. Paul, 383). Speech about political issues, by contrast, ordinarily may not be prohibited, though the boundaries and means of delineating speech that normally may not be proscribed are unclear (Sunstein, 9).

Once the court categorizes a type of speech, the presumptive ban against content-based regulation is applied. For both types of speech, the ban may be overcome when regulation of content is necessary to achieve a compelling state interest. Application of the ban thus involves a second balancing—a balancing of state interests and individual speech rights. For proscribable speech, however, the ban against content-based regulation may be overcome in four additional situations: first, "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists" (R.A.V. v. City of St. Paul, 388); second, when the proscribed content is

"associated with particular 'secondary effects' . . . so that the regulation is *'justified* without reference to the content of the . . . speech'" (R.A.V. v. City of St. Paul, 389 (quoting Renton v. Playtime Theatres, Inc. 475 U.S. 41, 48 (1986) (quoting with emphasis Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. 425 U.S. 748, 771 (1976)))); third, when the regulation outlaws conduct in a way that incidentally limits "a particular content-based subcategory of a proscribable class of speech" (R.A.V. v. City of St. Paul, 389); and fourth, when other regulatory reasons exist that do not constitute state suppression of ideas (390). To justify content-based regulation under this fourth situation "(where totally proscribable speech is at issue) it may not even be necessary to identify any particular 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot" (390). It is thus easier to sustain content-based regulation of proscribable speech than of ordinarily nonproscribable speech.

The surprising feature of the American decision is that content-based regulation of proscribable speech is limited at all. This result stands in marked contrast to the Canadian approach to speech regulation. Both countries use some type of balancing (in spite of the fact that the First Amendment guarantee appears categorical) as the review of the Canadian court's analysis will soon reveal. Yet, the two countries reach divergent conclusions: the United States upholds individual free speech rights even when proscribable speech is involved, while Canada attempts to eliminate the harms caused by hate speech by permitting its criminalization.

The Canadian Approach

The Canadian Supreme Court employs a two-phase analysis, characterized by balancing, to assess the constitutionality of speech restrictions. The first step of the Canadian Supreme Court's analysis is the *Irwin Toy* test, which is used to determine whether a law violates the *Canadian Charter's* free expression guarantee (Queen v. Keegstra, 728). Under the *Irwin Toy* test, the court makes two inquiries. First, it asks "whether the activity [being prohibited by the statute] . . . falls within the protected" sphere of freedom of expression (729). "If the activity [being prohibited] conveys or attempts to convey a meaning, it has expressive content and [therefore] . . . falls within the scope of the guarantee' . . . irrespective of the particular meaning . . . sought to be conveyed" (729 (quoting Irwin Toy Ltd. v. Quebec (Attorney General). [1989] 1 S.C.R. 927, 969)). Thus, as under the American analysis, freedom of expression is broadly protected, at least initially.

If the court determines that the prohibited activity falls within the scope of the free expression guarantee, the court performs the second inquiry, asking "whether the purpose of the impugned government action is to restrict freedom of expression" (Queen v. Keegstra, 729). If the government action restricts an expressive activity, the *Charter's* free expression guarantee is not violated (729), unless it is shown "that the activity supports rather than undermines the principles and values upon which freedom of expression is based" (730). Consequently, the government can restrict activities at the periphery of free expression values as long as it does so incidentally and not purposefully. This standard opens the door for speech limitations.

The second phase of the Canadian analysis involves a balancing that further accommodates limitations of expression. Labeled the *Oakes* test (735), this second phase seeks to determine "whether a limit on a right or freedom can be demonstrably justified in a free and democratic society" under section 1 of the *Canadian Charter of Rights and Freedoms* (734-35). The *Oakes* test itself has two prongs. The first prong requires that the governmental limit on free speech "[have] an objective of pressing and substantial concern in a free and democratic society" (735). This prong gives great weight to the needs of Canadian society. In *Keegstra*, for example, the hate speech provision was found to have a pressing social purpose, in part because the provision was adopted in response to studies indicating that "hate propaganda . . . was not insignificant" in Canada (745) and because hate propaganda threatened grave individual and social injury (745-48). Thus, while the *R.A.V.* Court gave

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little weight to the negative effects of hate speech as a justification for content-based restriction, Canada's *Keegstra* analysis cast individual and social harm as a compelling counterweight to freedom of speech.

The Canadian analysis also balances the individual and social interests in free speech under the second prong of the *Oakes* test. The second prong requires "proportionality between the objective"and the governmental action in question (735). To fulfill this proportionality requirement, governmental action must satisfy three additional requirements.

First, there must be a rational connection between the means chosen and the legislative objective (735). If an act does not further its objective, it is deemed irrational and fails this requirement.

Second, the means chosen for achieving the objective should minimally impair the constitutional freedom or right (735). While this minimal impairment language would seem to allow only restrictions that can be characterized as necessary, in fact the requirement is less stringent. The requirement does "not operate in every instance so as to force the government to rely upon only the mode of intervention least intrusive of a *Charter* right or freedom" (784). The government may choose "a more restrictive measure, either alone or as part of a larger programme of action, if that measure is not redundant, furthering the objective in ways that alternative responses could not, and is in all other respects proportionate to a valid" aim of the *Canadian Charter*, section 1 (785). Thus, while the United States Supreme Court requires that content-based regulation be necessary to achieve a compelling state interest, the Canadian Supreme Court appears willing to uphold a statute even though less restrictive options exist.

Third, the effect of the act must be proportional to its objective (735). Regulation cannot "present so grave a limitation upon [a *Charter]* guarantee . . . as to outweigh the benefits to be gained from [the] measure" (786). Under the proportionality inquiry, as under the minimal impairment analysis, the relation of the expression in question to "the values underlying the guarantee of freedom of speech" apparently influences the weight the expression is given (787). The less closely related the expression is to the values underlying free speech, the more likely the infringement will be held proportional to the infringement's objective.

While it is impossible to pinpoint why Canada adopted a more speech-restrictive approach, four reasons seem plausible: the constitutional text which guided the Court's inquiry, Canada's historical treatment of fundamental rights, the harms the Canadian Court considered in performing its balancing, and Canada's international legal obligations.

If a governmental act survives both prongs of the *Oakes* test, "the infringement [on] . . . freedom of expression as guaranteed by [the *Charter* is] upheld as a reasonable limit prescribed by law in a free and democratic society" (787). The *Oakes* test leaves ample room for such reasonable limits. Not only does the test mandate a balancing of freedom of expression against other concerns, but the test operates on the assumption that both the guarantees and the limits of *Charter* rights and freedoms flow from "[t]he underlying values of a free and democratic society" (736). By holding that these values form the foundation for *Charter* guarantees, as well as for the limits on those guarantees, the test establishes social needs and values as the standard for identifying and limiting rights. As a result, individual rights are deprived of independent value. They are accorded weight only to the degree they correspond to and support social values. Depriving individual rights of autonomous protection provides the Court significant leeway to limit such rights. Thus, the *Keegstra* Court found the prohibited speech "not closely linked to the rationale underlying" the free expression guarantee and consequently proscribable (762), in contrast to the Court in *R.A.V.*

However, lest it appear from the cases analyzed that the Canadian and American approaches to criminal speech regulation are more divergent than they actually are, it should be noted here that the United States Supreme Court did not reach the merits of the St. Paul ordinance, but held that it was invalid on its face because it was unconstitutionally content-based (Sajo 1995). Like Canada, the United States has in fact been willing to sustain criminalization of certain speech, such as the counseling of murder, under the First Amendment (Sajo; Greenawalt 1989, 191). Moreover, the United States has not adopted a single approach for addressing speech regulation; hence, the *R.A.V.* case does not provide a complete picture of the extent to which the United States will sustain free speech limitations. Nevertheless, as the above descriptions of the American and Canadian approaches to hate speech reveal, the Canadian court has been more willing than the U.S. court to limit free expression, at least in this narrow arena.

II. Possible Reasons for Canada's Relative Willingness to Limit Free Speech

While it is impossible to pinpoint why Canada adopted a more speech-restrictive approach, four reasons seem plausible: the constitutional text that guided the court's inquiry, Canada's historical treatment of fundamental rights, the harms the Canadian court considered in performing its balancing, and Canada's international legal obligations. This paper now turns to an exploration of these influences.

The Text of the Canadian Charter of Rights and Freedoms

While America's First Amendment expresses a facially absolute prohibition against governmental infringement on free speech, the *Canadian Charter of Rights and Freedoms* contains a free expression guarantee that may be limited and even ignored by the federal and provincial governments. Section 2 of the *Charter* guarantees that "[e]veryone has the following fundamental freedoms: . . . freedom of thought, belief, opinion and expression" (Constitution Act 1982, § 2). Section 1, however, provides that the rights and freedoms guaranteed by the *Charter* are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (§ 1). Section 1 confines infringements on free expression to those that are reasonable and demonstrably justifiable, yet it clearly accommodates limits. The Canadian court in *Keegstra* therefore began from a position that presupposed the possibility of governmental infringements on individual free expression. Beginning from such a position, it is unstartling that the court was willing to sustain some speech limitations. This is not to suggest that it is surprising that the U.S. court has upheld free speech limitations under a facially unconditional bar against speech regulation, but only to suggest that it is easier to sustain restrictions when the possibility of limits is expressly recognized by the very document that guarantees the right.

Not only does the *Canadian Charter* permit limits on *Charter* freedoms, under section 33 it authorizes "Parliament or the legislature of a province[, within certain limits, to] expressly declare in an Act of Parliament or of the legislature . . . that the Act or a provision thereof shall operate notwithstanding [the guarantees] included in section 2" (§ 33). Section 33 did not apply in *Keegstra* as the hate speech provision in question was not expressly exempt from the reach of section 2. Yet the section may have influenced the *Keegstra* court. The section seems to constitutionalize the notion that legislatures are supreme and can even proscribe individual rights in the exercise of their sovereignty (Marx 1982, 71). The mere presence of the provision in the Canadian Constitution, regardless of its immediate relevance to the case at hand, may have led the court to defer to the legislature. In sum, the *Charter's* textual recognition of legislative supremacy and of the proscribability of fundamental rights may well have contributed to the court's willingness to uphold free expression limitations.

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Canada's Historical Treatment of Fundamental Rights

In pursuing its more speech-restrictive approach, the Canadian court may also have been influenced by Canada's historical treatment of fundamental freedoms which reveals only recent recognition of speech as an explicit constitutional right, a lack of independent protection for fundamental rights, and an acceptance of parliamentary supremacy over individual freedoms.

When claims involving fundamental freedoms were brought before Canadian courts under the British North America Act of 1867, the courts had no constitutional basis for protecting those rights.

Canada's first constitutional document was the British North America Act of 1867. The BNA Act, later titled the Constitution Act, 1867 (Hogg 1985, 4), sought to carry out the desire of "the Provinces of Canada, Nova Scotia, and New Brunswick . . . to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom" (Constitution Act 1867, preamble). The act fulfilled two purposes: it "established the rules of federalism," allocating power between the federal Parliament and the provincial legislatures (Hogg, 2), and it gave Canada a constitution similar to that of England. The act did not, however, attempt to create a constitutional system of fundamental freedoms for the dominion (2). Under the act's federalist allocations, neither the federal nor the provincial legislatures "were . . . intended to serve as the instruments for the protection of fundamental rights" (Cotler 1982, 126). Instead, by prescribing for Canada a constitution similar to that of England, the act adopted the English theory of parliamentary sovereignty, which meant that parliament was empowered to enact whatever laws it deemed necessary, including laws that limited fundamental freedoms such as speech (129). The BNA Act thus provided no guarantees for individual rights and even recognized the constitutionality of legislative infringements.

As a result, when claims involving fundamental freedoms were brought before Canadian courts under the act, the courts had no constitutional basis for protecting those rights. The courts could look only to principles of federalism and parliamentary supremacy expounded by the act. Fundamental rights claims were therefore often decided within the framework of legal federalism (124). Legal federalism assumed the supremacy of parliament (129) and focused the courts, not on "limitations on the exercise of [legislative] power," but on "the division of powers between the federal and provincial governments." When "federal or provincial law appeared to offend . . . civil liberties, the central question . . . became . . . [whether] the alleged denial of civil liberties [was] within the legislative power of the offending government" (124). If the denial fit within the power of the enacting government, the denial was upheld (124). Only if the denial fell outside the enacting legislature's authority was the denial declared unconstitutional, not because it limited an individual's fundamental rights but because the legislation violated the federalist division of authority.

For example, in *Union Colliery Co. v. Bryden* the Judicial Committee of the Privy Council was presented with a provincial law that forbade employing Chinese individuals in subterranean coal mines (Cotler, 125 (citing Union Colliery Co. Ltd. v. Bryden. [1899] A.C. 580 (P.C.))). The Judicial Committee found the act unconstitutional but not because it was racially discriminatory. The act was unconstitutional because it was without the legislative competence of the provincial legislature: the act dealt with alien or non-naturalized citizens, and matters of naturalization and alienism were within the federal, not provincial domain (Cotler, 125).

While the legal federalism analysis served to protect individual rights in *Bryden*, the analysis led to affirmation of an infringement on speech rights in *Nova Scotia Board of Censors v. McNeil*. In *McNeil*, a provincial censorship law had been used to prevent exhibition of a film (Re Nova Scotia Board of Censors and McNeil 1978, 1, 4-5). The Canadian Supreme Court

upheld the law because it was "in pith and substance directed to property and civil rights" and therefore lay within the provincial legislature's authority (2). Even the dissenting judge, Chief Justice Laskin, who recognized the infringement on individual rights "would have invalidated the legislation on the grounds that it [was] 'within the exclusive power of the Parliament of Canada under its enumerated authority to legislate in relation to the criminal law,'" not on the grounds that it violated fundamental freedom (Cotler, 127 (quoting Re Nova Scotia Board of Censors and McNeil 1978, 14)).

While the legal federalism analysis appears to blatantly ignore the independent weight of fundamental rights, the analysis may in fact have been the only means of protecting fundamental rights that would have been consistent with existing law (Cotler, 126). As mentioned, the BNA Act contained no explicit guarantee of fundamental rights; instead the act incorporated the rule of parliamentary supremacy with its notion that Parliament could limit rights almost at will (126-27). As a result, the courts may have found legal federalism to be the most appropriate or indeed the only means whereby they could respect the BNA Act and its attendant principle of legislative sovereignty while still providing some protection for fundamental freedoms (127). Whether the courts were trying to protect fundamental rights or not, the reality remains that under legal federalism analysis fundamental rights lacked independent weight. Instead, rights were viewed as clearly proscribable by a legislature in the proper exercise of its constitutional authority (129).

In 1960 Canada adopted a bill of rights (Hogg, 639). The Canadian Bill of Rights "declared that in Canada there have existed and shall continue to exist . . . the following human rights and fundamental freedoms, namely, . . . freedom of speech" (Part I, § 1). However, the form and scope of the Bill, as well as the manner in which it was applied, limited the Bill's effectiveness. The Bill was enacted as a piece of federal legislation applicable only to federal law and subject to amendment through the normal legislative process (Hogg, 639-40). In addition, instead of seizing upon the Bill's explicit guarantees, the Canadian Supreme Court continued to neglect fundamental freedom issues and was apparently influenced by legal federalism in deciding the validity of federal limits on individual rights under the Bill (Cotler, 130-31). Consequently, before the *Charter* was adopted, Canadian courts "[had] never really confronted the system of freedom of expression head-on; nor [had] the courts grappled with the fundamental value claims and collisions that have dominated American case-law" (134).

Canada's pre-*Charter* constitutional history reveals first the relative recentness of Canada's explicit recognition of free speech as a fundamental legal right, second the Supreme Court's reluctance to accord independent legal weight to fundamental rights, and third the court's willingness to uphold infringements on free speech rights by competent legislative acts. While the *Charter* altered the constitutional framework in which the *Keegstra* Court operated, the *Charter* did not foreclose the influence of these historical trends. As noted, the rule of parliamentary supremacy found its way into section 33 of the *Charter* and therefore remained part of the constitutional landscape in which *Keegstra* was decided. Similarly, the reluctance to give individual rights separate weight was consistent with the premise of section 1 that both guarantees and limits the values of a democratic society. Because these historical practices were compatible with the *Charter* text and because they had figured so prominently in Canada's constitutional experience, the

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court may well have been influenced by these practices in assessing the constitutionality of free speech regulation in *Keegstra*.

The Harms the Canadian Court Considered

The Court may also have reached a more speech-restrictive result because of the harms it was willing to consider in balancing the individual's free speech rights against the needs of Canadian society (Sajo). Again, comparison with the United States approach is revealing. United States free speech jurisprudence has been heavily influenced by the *Brandenburg* clear-and-present-danger test (Greenawalt, 188), which maintains "that the constitutional guarantees of free speech and free press do not permit a State to . . . proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (Brandenburg v. Ohio 1969, 447). The clear-and-present-danger paradigm permits the court to sustain proscription of certain speech only when immediate harms might otherwise result.

In contrast, the Canadian balancing considers long-term harm. For example, in assessing whether a pressing legislative objective supported *Keegstra's* criminal hate speech provision, the Canadian court was heavily influenced by the fact that hate propaganda threatens "the self-dignity of target group members" and may result in the acceptance of "prejudiced messages . . . with the attendant result of discrimination, and perhaps even violence, against minority groups in [Canada]" (Queen v. Keegstra, 748). Because the Canadian Court broadly considers long-term social harm, as it did in *Keegstra*, social interests are more likely to outweigh individual rights under the Canadian analysis than under the U.S. approach, which concentrates on the narrower category of immediate harms. Canada's more expansive view of constitutionally relevant harm appears to be a third factor influencing the court to uphold limits on free expression (Sajo).

Canada's International Legal Obligations

The Canadian court also appears influenced by Canada's international legal obligations. Prior to *Keegstra*, Canada had committed to prohibit certain types of hate speech under two relevant treaties: the International Covenant on Civil and Political Rights, which was "adopted by the United Nations in 1966 and [has been] in force in Canada since 1976," and the International Convention on the Elimination of All Forms of Racial Discrimination, to which Canada was a signatory member and which has been "in force since 1969" (Queen v. Keegstra, 751). The Covenant on Civil and Political Rights imposes on its signatories the obligation to outlaw "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" (U.S. Department of State 1994, International Covenant art. 20). Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination binds states' parties to

> declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof. (U.N. 1970, art. 4, ¶ a)

Given the obligations imposed by both treaties, the Canadian court found that Canada was not only permitted but expected to prohibit "hate-promoting expression" as part of its "guarantee of human rights" (Queen v. Keegstra, 754).

By contrast, when *R.A.V.* was decided, the United States was a party to neither of these treaties (Sajo). Thus, the United States was not obligated to prohibit any form of hate speech. Since the time of *R.A.V.*, the United States has ratified the International Covenant on Civil and Political Rights; the covenant "entered into force . . . for the United States September 8, 1992" (U.S. Department of State 1994, *Treaties in Force* 350). Yet the United States ratified the covenant subject to a significant reservation: "That Article 20 [the article requiring prohibition of certain forms of hate speech]

does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States" (U.S. Congress 1992, I(1)). U.S. ratification was subject to other reservations, understandings, and declarations that likewise diminish the United States's obligations under the covenant. For example, "Articles 1 through 27 of the covenant are not self-executing" in the United States (III(1)). The effect, if any, of the United States's qualified ratification of the covenant has yet to be determined (Sajo), though the Initial Report of the United States to the U.N. Human Rights Committee indicates that prohibition of some but not all "types of expression inciting discrimination, hostility or violence"—as may be required under article 20—would be "[im]permissible under the U.S. Constitution" and so could not be upheld in spite of the United States's ratification of the covenant (U.S. Department of State 1994, *Civil and Political Rights* 160). The effect of Canada's ratification of the covenant and convention, on the other hand, was made clear by the *Keegstra* Court: Canada's treaty obligations support restriction of hate speech (Queen v. Keegstra, 754) and provide another plausible reason why the Canadian Court was more willing than the U.S. Supreme Court to limit freedom of expression.

Conclusion

While it is impossible to identify with certainty the cause of the Canadian Supreme Court's relative willingness to sustain limitations on free speech, highly tenable reasons may be found in Canada's *Charter of Rights and Freedoms*, which recognizes the power of Canadian legislatures to limit and override the *Charter's* free expression guarantee; Canada's historical treatment of fundamental freedoms, which included practices and perspectives amenable to speech limitations; Canada's consideration of long-range harms in balancing social needs against individual rights; and Canada's international obligation to proscribe hate propaganda. These reasons may well have led the Canadian Supreme Court in *Keegstra*, in contrast to the United States Supreme Court in *R.A.V.*, to conclude that the criminalization of hate speech was a "reasonable limit . . . demonstrably justified in [Canada's] free and democratic society" (Constitution Act 1982, § 1).

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WORKS CITED

Bracken, Harry M. 1994. *Freedom of speech: Words are not deeds.* Westport, Connecticut: Praeger Publishers.

Brandenburg v. Ohio. 395 U.S. 444 (1969).

Canada. Canadian Bill of Rights. 1960. Reprinted in Hogg, Peter W. 1985. *The Canadian Charter of Rights and Freedoms.* 895-97. Toronto: Carswell Co. Ltd.

Canada. 1982. Constitution Act. Part I: Canadian Charter of Rights and Freedoms.

Canada. 1867. Constitution Act.

Chaplinsky v. New Hampshire. 315 U.S. 568 (1942).

Cotler, Irwin. 1982. Freedom of assembly, association, conscience and religion. In *The Canadian Charter of Rights and Freedoms.* ed. Walter S. Tarnopolsky and Gerald-A. Beaudoin, 124-213. Toronto: Carswell Co. Ltd.

Greenawalt, Kent. 1989. *Speech, crime, and the uses of language.* New York: Oxford University Press.

Hogg, Peter W. 1985. *Constitutional law of Canada.* Toronto: Carswell Co. Ltd.

Marx, Herbert. 1982. Entrenchment, limitations and non-obstante. In *The Canadian Charter of Rights and Freedoms,* ed. Walter S. Tarnopolsky and Gerald-A. Beaudoin, 61-74. Toronto: Carswell Co. Ltd.

– Works Cited Con't on Page 46 –

Works Cited Con't from Page 45

Queen v. Keegstra. [1990] 3 S.C.R. 697.

R.A.V. v. City of St. Paul, Minnesota. 505 U.S. 377 (1992).

Re Nova Scotia Board of Censors and McNeil. 84 D.L.R.3d 1 (1978).

Sajo, Andras. 1995. Visiting Professor, BYU J. Reuben Clark Law School. Discussion with author.

Sunstein, Cass R. 1993. *Democracy and the problem of free speech.* New York: Free Press.

United Nations. Office of Public Information. 1970 *International Convention on the Elimination of All Forms of Racial Discrimination.* [New York]: United Nations, Office of Public Information.

United States Congress. Senate. 1992. Resolution of Senate Advice and Consent. Reprinted in United States Department of State. 1994. *Civil and political rights in the United States: Initial report of the United States of America to the UN Human Rights Committee under the International Covenant on Civil and Political Rights.* [Washington, D.C.]: U.S. Department of State.

United States Department of State. 1994. International Covenant on Civil and Political Rights. Reprinted in *Civil and political rights in the United States: Initial report of the United States of America to the UN Human Rights Committee under the International Covenant on Civil and Political Rights.* [Washington, D.C.]: U.S. Department of State.

_____. 1994. *Treaties in force: A list of treaties and other agreements of the United States in force on January 1, 1994.* [Washington, D.C.]: U.S. Department of State.